



HB 4077, 4148-4157- House Michigan Competitiveness Committee

Position: Support

March 7, 2017

FOIA/LORA Bill Package

The ACLU of Michigan supports HB 4077 and 4148-4157 because we believe that government transparency is critical to democracy and good government includes tools, like the Freedom of Information Act ("FOIA"), that allow citizens to access accurate information and ensure accountability.

Michigan has had a long tradition of expectation of open government. In 1968, the Michigan Court of Appeals held "that citizens have the general right of free access to, and public inspection of, public records" and that this was a "fundamental rule in Michigan."¹

In the late 1970s, approximately ten years after the federal FOIA was enacted by Congress, Michigan enacted its own FOIA laws. At that time, the legislature set forth the important public policy of the State that "all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. *The people shall be informed so that they may fully participate in the democratic process.*"²

It is clear that FOIA was designed to guarantee the public has access to public records of government bodies at all levels in Michigan and serves as a cornerstone of our democracy. Unfortunately, Michigan remains one of only two states where both the legislature and the executive office are exempted from responding to FOIA requests.³ In fact, most states do not exempt either branch and only a few exempt one or the other.⁴ As a result, these protective laws have created a culture in Michigan of a government that operates with little expectation of meaningful public oversight.

In 2015 the Center for Public Integrity and Global Integrity, two nonprofit organizations that promote government transparency and ethics, conducted a national study assessing government transparency and accountability of each state by analyzing laws designed to prevent and expose corruption and how those laws are implemented. Eleven states received a failing grade of "F", including Michigan, which ranked dead last. Among those factors contributing to Michigan's failing grade: lack of executive and legislative accountability and lack of public access to information.⁵

Due to several recent events, such as the Flint water crisis, interest has centered on subjecting the legislative and executive branches to more transparency. As the Flint water crisis unfolded under the bright lights of a national stage, the eventual disclosure of some Flint related emails revealed that government actors often attempted to pre-empt scrutiny through mechanisms such as: including a

disclaimer that the correspondence was attorney-client privilege (even when neither party was an attorney) or including a subject heading categorizing the message as “preliminary and deliberative” or “not subject to FOIA”. Flint was an example of when happens when our elected officials can pick and choose when, how, and what information is actually disclosed to the public.

Although expanding FOIA would not have necessarily prevented the Flint water crisis, the ACLU of Michigan agrees with Michigan Coalition for Open Government, when its President so accurately said:

“If there is a silver lining in what clearly is a tragedy in Flint, it’s that freedom of information, accountability, and transparency are getting noticed. More broadly, the situation has renewed national conversation about the value of the public’s right to know and the role of accountability in effective government”.

In Michigan, that conversation has resulted in this bipartisan bill package expanding FOIA to apply to the Governor and his executive office staff as well as establishing a new Legislative Open Records Act (“LORA”) to apply to the legislature. This package carries a central and strong message: that we should not continue to shield our public officials from basic anti-corruption and anti-secrecy laws; that people cannot fully participate in our democracy without greater transparency; and that a government that exempts certain government officials from transparency is not an open government. We believe this is a critical step of securing government transparency so that what happened in Flint never happens again.

Respectfully submitted,

Kimberly S. Buddin, Policy Counsel
American Civil Liberties Union of Michigan
Kbuddin-crawford@aclumich.org
313-579-6806 | 734-945-2636

¹ *Booth Newspapers, Inc. v. Muskegon Probate Judge*, 15 Mich. App. 203; 166 N.W.2d 546 (1968).

² 1976 P.A. 442; MCL §15.231(2).

³ In Massachusetts, the Legislature is exempt by statute and the governor's office is exempt as a result of a court ruling. *See Lambert v. Executive Dir. Of the Judicial Nominating Council*, 425 Mass. 406, 409 (1997).

⁴ Many states give exemptions to the governor's office that fall short of a blanket exemption. For example, in Arkansas, "working papers" of the governor are exempt and the exemption has been interpreted narrowly. Ark. Code Ann. § 25-19-105(b)(7). In Tennessee, the governor may protect "papers relating immediately to the executive department, and in the governor's judgment, requiring secrecy." T.C.A. §8-3-104(10).

⁵ The Center for Public Integrity, *Michigan gets F grade in 2015 State Integrity Investigation: An honor system with no honor*, Nov. 19, 2015, <https://www.publicintegrity.org/2015/11/09/18427/michigan-gets-f-grade-2015-state-integrity-investigation>.